Case No. D1/15

Salaries tax – appeal against assessment – lodging an appeal to the Board out of time – whether leave should be given – section 66(1A) of the Inland Revenue Ordinance ('IRO')

Panel: Chui Pak Ming Norman (chairman), Liu Kin Sing and Yuen Miu Ling Wendy.

Dates of hearing: 26 February 2015.
Date of decision: 15 April 2015.

The Appellant objected to the Commissioner's Additional Salaries Tax Assessment on the bonus he received from his employer for the 2008/09 year of assessment. The Commissioner rejected the Appellant's objection in a written Determination dated 2 September 2014. It was accompanied by a letter from the Commissioner on the same date setting out the details for lodging an appeal. The Appellant wrote to the Commissioner on 24 September 2014 requesting the Commissioner to reconsider the Determination. The Commissioner replied by letter on 30 September 2014 stating that he already considered the facts fully in the Determination. He further advised the Appellant that if he wished to pursue the objection further, the proper procedure was for him to lodge an appeal in writing to the Board of Review ('the Board') under section 66 of the IRO, within 1 month of the Determination. The Appellant filed a notice of appeal to the Board on 9 October 2014. He explained that he was misled by his then tax consultant that he should write to the Commissioner for lodging an appeal and for an extension of time. He also claimed that an extension of time for several days was not unreasonable, given the matter was dragged on for more than 3 years. The Board considered as a preliminary issue whether leave should be granted to the Appellant to file his notice of appeal out of time.

Held:

1. According to section 66(1A) of the IRO, the Board could only give leave to the Appellant to file his notice of appeal out of time if he was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the statutory period. The word 'prevented' should be understood as meaning 'unable to'. Whilst it was a less stringent test than the word 'prevent', it still imposed a higher threshold than mere excuse in order to give proper effect to the rigour of time limit under the IRO (Chow Kwong Fai v Commissioner of Inland Revenue [2005] HKLRD 687 referred).

2. Absence from Hong Kong does not automatically confer a right for extension of time (D19/01, IRBRD, vol 16, 183; D44/11, (2012-13) IRBRD, vol 27, 768 referred). It was not sufficient for the taxpayer to show that his failure to

lodge an appeal within time due to illness, absence from Hong Kong or other reasonable cause. The taxpayer must also satisfy the Board that he was prevented by such illness, absence or reasonable cause to lodge an appeal within time (D33/07, (2007-08) IRBRD, vol 22, 791; D55/09, (2009-10) IRBRD, vol 24, 993; D35/12, (2012-13) IRBRD, vol 27, 768 referred).

3. Unilateral mistake on an appellant's part could not be properly described as a reasonable cause which prevented him from lodging the notice of appeal within time (Chow Kwong Fai v Commissioner of Inland Revenue [2005] HKLRD 687 referred). A careless mistake on the appellant's part resulting in a notice of appeal being sent to the wrong party could not constitute a reasonable cause (D139/00, IRBRD, vol 16, 34 referred). Similarly, delay attributed solely to an appellant's failure to read properly the letter accompanying a determination was not a reasonable cause (D2/03, IRBRD, vol 18, 301 referred).

4. The Appellant did not suffer from any illness during the statutory period for lodging the notice of appeal. He was in Hong Kong for 20 days during that period, and could give notice of appeal within time by himself or by engaging a representative to give on his behalf. He was not prevented from filing a notice of appeal within time by illness or absence from Hong Kong.

5. There was no reasonable cause preventing the Appellant from lodging the notice of appeal within time. The emails exchanged between the Appellant and Company A showed that the advice given to the Appellant was that the appeal should be lodged with the Board. He was not misled.

6. Further, the Appellant's letter on 24 September 2014 did not amount to a notice of appeal or a request for an extension of time as it simply asked the Commissioner to reconsider the Determination.

7. Since the tax representative was engaged by the Appellant, the mistake, if any, as to the party with which to file the notice of appeal was unilateral and made solely on the Appellant's part. It did not amount to any reasonable cause.

8. As the details of time limit and procedures for an appeal were set out in the Commissioner's letter dated 2 September 2014, there was no obligation on the Commissioner's part to remind the Appellant the same again. The Appellant's argument that he could only read the Commissioner's letter of 30 September 2014 on 6 October 2014 was irrelevant.

9. The only conclusion was to dismiss the Appellant's application for leave to grant him an extension of time to file the notice of appeal against the

Determination. Since there was no proper appeal before the Board, the Additional Salaries Tax Assessment should stand.

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] HKLRD 687
D33/07, (2007-08) IRBRD, vol 22, 791
D55/09, (2009-10) IRBRD, vol 24, 993
D35/12, (2012-13) IRBRD, vol 27, 768
D19/01, IRBRD, vol 16, 183
D44/11, (2012-13) IRBRD, vol 27, 768
D139/00, IRBRD, vol 16, 34
D2/03, IRBRD, vol 18, 301

Appellant in person.
Lam Cheuk Lun Aaron, Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Respondent first raised on the Appellant the 2008/09 Salaries Tax Assessment on the basis of the Appellant's Tax Return. Upon consideration of further information and documents furnished by the Appellant's employer, the Respondent became aware of an additional assessable income (being bonus) received by the Appellant. As such the Respondent raised on the Appellant an Additional Salaries Tax Assessment dated 2 February 2010, which was subject of the Appellant's objection.

2. After considering the documents and submission made by the Appellant to the Respondent on the Appellant's grounds of objection, by a letter dated 2 September 2014, the Respondent notified the Appellant that he was unable to agree with the objections, under which a written determination also dated 2 September 2014 was enclosed to the Appellant.

3. On 24 September 2014 the Appellant wrote to the Respondent expressing his view on the determination and making further submission on the determination. That letter was received by the Respondent on 25 September 2014.

4. By the letter dated 30 September 2014, the Respondent replied that the Respondent has fully considered the facts of his case and reached the decision by issuing a determination on 2 September 2014 to him under section 64(4) of the Inland Revenue

Ordinance ('Ordinance'). The Respondent further advised him that if he wishes to pursue the objection further, the proper procedure is for him to lodge an appeal to the Board of Review ('Board'), an independent statutory body from the Inland Revenue Department, according to section 66 of the Ordinance. In the said letter, the Respondent also drew the Appellant's attention that an appeal to the Board must be given in writing within one month after the transmission to him of the Respondent's determination. The Respondent also drew his attention that for further details of lodging the appeal, he may refer to paragraph 3 of the Respondent's covering letter also dated 2 September 2014 and that an appeal to the Board of Review must be given in writing within one month after the transmission to him of the Deputy Commissioner's determination and according to section 68(1B) of the Ordinance, settlement of an appeal had to be endorsed by the Board.

5. The Appellant subsequently filed a notice of appeal to the Board which was received by the Board on 9 October 2014. On 10 October 2014, the Clerk of the Board wrote back to the Appellant informing that the notice is *prima facie* invalid as it falls outside the statutory 1-month period and the Appellant may wish to consider invoking the jurisdiction of the Board to grant the Appellant an extension of time.

6. By a letter dated 22 December 2014 from the Clerk to the parties, the Clerk informed the parties the date of hearing and that the Board will, at the hearing, hear the Appellant's application under section 66(1)(b) of the Ordinance for leave to give notice of appeal to the Board out of time. In the said letter, it was also mentioned that should the Board grant the Appellant leave, another hearing will be fixed to hear the appeal.

The Issue at the hearing scheduled on 26 February 2015

7. It follows that the hearing taken place on 26 February 2015 was limited to the preliminary issue whether or not leave should be granted to the Appellant to file his notice of appeal to the Board out of time.

The Undisputed Facts

8. The following facts were not disputed by the parties:

(a) The Respondent's letter and the determination, both dated 2 September 2014 was received by the Appellant on 3 September 2014.

(b) In the Respondent's letter dated 2 September 2014, the Respondent had advised the Appellant's right of appeal under section 66 of the Ordinance and an extract of the said section 66 was also annexed in the said letter. In the said letter, the Respondent also, amongst others, informed the Appellant that the notice of appeal has to be given to the

Clerk to the Board and must be given within one month after the transmission to him of the written determination. The Appellant was also advised of the address, opening hours and contact details of the Clerk to the Board in the said letter.

(c) The deadline for the Appellant to file his notice of appeal expired on 3 October 2014.

(d) The notice of appeal dated 7 October 2014 was received by the Board on 9 October 2014.

(e) There was no issue of illness on the part of the Appellant during the period from 3 September 2014 to 9 October 2014.

(f) During the period from 3 September 2014 to 9 October 2014, the Appellant was present in Hong Kong save for the following periods:

(1) 17 September 2014 (from 12:26 p.m.) to 18 September 2014 (7:48 p.m.);

(2) 26 September 2014 (from 10:34 p.m.) to 6 October 2014 (7:05 a.m.)

Appellant's Evidence and Submission

9. Basically, the Appellant said that he did not quite understand the procedure of lodging an appeal and that he was ill-advised or misled by Company A, his then tax consultant that he should write to the Respondent for lodging an appeal and for an extension of time. He produced certain e-mails exchanged between Company A and him between 17 September 2014 and 23 September 2014 to support his claim.

10. He relied on his e-mail dated 22 September 2014 to Ms B of Company A in which he wrote 'in the interim you (Ms B) will ask the Respondent for additional time'. However by an e-mail from Ms B to the Appellant dated 23 September 2014, Ms B of Company A wrote in reply 'referring to our discussion this afternoon, we (Company A) understand that you (the Appellant) will write to the IRD yourself in response to their determination issued on 2 September 2014.'

11. The Appellant's claim of lacking of knowledge of the lodging an appeal was contradicted by the Respondent in his cross-examination that detailed procedure of lodging an appeal as well as the statutory requirement of lodging an appeal within 1-month upon the transmission of the determination were clearly stated in the Respondent's letter dated 2 September 2014 to the Appellant.

12. Lastly the Appellant submitted that since the matter had been dragged on for more than 3 years before the determination was made on 2 September 2014, the extension of several days to enable him to file the notice of appeal out of time is not an unreasonable request.

Respondent's Submission

13. The Respondent referred the Tribunal to section 66(1A) which stipulates *inter alia*:

> ' *If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1).*'

14. The Respondent submitted that only under 3 circumstances in which the Board could exercise its discretion under section 66(1A) to give leave for the Appellant to file his notice of appeal out of time, namely, he was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the statutory period.

15. As to the issue of illness, the Respondent submitted that it was common ground that the Respondent did not have illness in the relevant period.

16. As to the issue of absence from Hong Kong within the statutory period, it was the Respondent's submission that during the statutory period in question (i.e. between 3 September 2014 and 3 October 2014), the Appellant was present in Hong Kong for about 20 days and there was ample time for the Appellant to file the notice of appeal within the statutory period. The Respondent argued that the Appellant's absence in Hong Kong for about 10 days during the statutory period could not prevent him from filing the notice of appeal.

17. As to the third ground, the Respondent submitted that there was no evidence of other reasonable cause which justified an extension of time before the Tribunal.

The Relevant Legal Principles

18. The Respondent referred the Tribunal to the following cases or decisions:

(a) Chow Kwong Fai v Commissioner of Inland Revenue [2005] HKLRD 687, in which the Court of Appeal held 'while a liberal interpretation must be given to the word "prevented" used in section 66(1A), it should best be understood to bear the meaning of the term "未能" in the

Chinese language version of the subsection. The term means "unable to". The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute'. (See paragraph 20)

(b) As to the point of prevented from giving notice of appeal within the statutory time limited due to absence from Hong Kong or other reasonable cause, the Board was referred to the following previous decisions made by the Board:

(i) It has been reiterated by the Board in various occasions that the mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory 1-month period; it is not sufficient for the taxpayer that he has proved that his failure in time was due to illness, absence from Hong Kong or other reasonable cause but he must also satisfy the Board that he was prevented by such illness, absence or reasonable cause to lodge an appeal within the time prescribed (Paragraphs 16 and 17 of D33/07, (2007-08) IRBRD, vol 22, 791, Paragraph 11 of D55/09, (2009-10) IRBRD, vol 24, 993 and Paragraph 12(d) of D35/12, (2012-13) IRBRD, vol 27, 768).

(ii) Absence from Hong Kong does not confer an automatic right for extension of time (paragraph 14 of D19/01, IRBRD, vol 16, 183 and paragraph 15 of D44/11, (2012-13) IRBRD, vol 27, 768).

(c) Unilateral mistake on the appellant's part cannot be properly described as a reasonable cause which prevent him from lodging the notice of appeal within time (paragraph 45 of Chow Kwong Fai v Commissioner of Inland Revenue [2005] HKLRD 687).

(d) Careless mistake caused by the appellant's failure to exercise due care when the Appellant read the letter from the Commissioner thus resulting in a notice of appeal being sent to a wrong party cannot possibly constitute a reasonable cause which warrants the Board to exercise its discretion to extend time (paragraph 15 of D139/00, IRBRD, vol 16, 34).

(e) The Appellant's delay attributed solely by his failure to read properly the letter that accompanied the determination was not a reasonable cause for granting any extension (paragraph 10 of D2/03, IRBRD, vol 18, 301).

Discussion

19. The Tribunal carefully considered the Appellant's evidence given, both parties' submissions as well as the relevant legal principles involving in exercising its discretion to grant leave to an Appellant to give notice of appeal outside the statutory periods submitted by the Respondent.

20. As stated in section 66(1A) of the Ordinance, the Board could exercise its discretion to grant an extension of time for the Appellant to give notice of appeal outside the statutory period if the Board is satisfied that the Appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the statutory period.

21. The Board is satisfied that the Appellant was not prevented by illness from giving notice of appeal within the statutory period as it was common ground that there was no illness suffered by the Appellant during the statutory period.

22. During the statutory period, the Appellant was present in Hong Kong for about 20 days. He could file a notice of appeal anytime while he was in Hong Kong in that period. He had ample time to file the notice of appeal if he chose to do so. The absence of 10 days in Hong Kong out of 30 days in the statutory period (i.e. from 3 September 2014 to 3 October 2014) could not possibly be on the 'absence ground' for the Board to exercise its discretion in the Appellant's favor as he had 20 days in that period to do so. As a matter of fact, if the Appellant wished to give notice of appeal within the statutory period, he could give the same himself or engage a representative to give on his behalf.

23. If there was any reason or explanation for the Appellant not to give notice of appeal within the statutory period, the possible ground was on 'other reasonable cause preventing him from doing so'. Although there was no direct evidence from the Appellant on 'other reasonable cause preventing him from doing so', from his submission, he relied on the fact that he was misled from his tax consultant that he should write to the Respondent for lodging an appeal and for an extension of time to lodge an appeal and it was not unreasonable to allow him to proceed with the appeal because the matter had been dragged on for 3 years before the Respondent made its determination yet the delay was only 6 days.

24. As said in the above, in support of his claim that he was misled by Company A, the Appellant produced the e-mails exchanged between Company A and him for the period from 17 September 2014 to 23 September 2014 for the Board's consideration.

25. In his e-mail dated 22 September 2014 to Ms B of Company A, the Appellant wrote 'in the interim you will ask the IRD for additional time'. In reply to his e-mail of 23 September 2014, Ms B of Company A wrote 'referring to our discussion this afternoon, we understand that you will write to the IRD yourself in response to their determination issued on September 2, 2014. If any of our understanding is incorrect, please let us know.'

26. From these 2 e-mails, the Board could not draw any conclusion that Company A had advised the Appellant to lodge an appeal against the determination with Inland Revenue Department instead of the Board of Review. Taking them the highest, the said e-mails only revealed that it was the consensus between the Appellant and his tax consultant that the Appellant would personally ask for an extension of time in response to IRD's determination. The Board did not know why the Appellant had to write to IRD for an extension of time.

27. The Appellant did write to the IRD on 24 September 2014. However, the contents of the Appellant dated 24 September 2014 to the IRD did not suggest that the Appellant asked for any extension of time. The letter, in the Board's view, only addressed further on the determination of the Respondent and requested the Respondent to reconsider his determination. The letter did not amount to a notice of appeal nor a request for an extension of time to lodge an appeal.

28. The Board noted that in the e-mail from Mr C of Company A dated 17 September 2014 to the Appellant, he wrote 'we have received the tax representative copy of the reply from the IRD dated September 2, 2014…… In regard of this, please let us know if you would like our assistance on proceeding further appeal to the Board of Review…….'.

29. Upon reading the e-mails exchanged between the Appellant and Company A aforesaid and his letter to the IRD of 24 September 2014, the Board could not find any advice provided by Company A that the Appellant should lodge an appeal with the IRD or write to the IRD for an extension of time. It appears to the Board that if there was an advice given, the advice from Company A was that the appeal should be lodged with the Board of Review.

30. The Board could not conclude that the Appellant was misled by Company A to lodge an appeal to the IRD. Even if Company A advised the Appellant to lodge an appeal with the Inland Revenue Department or asked the IRD for an extension of time to lodge a notice of appeal, it appears to the Board that the Appellant did not rely on and take Company A's advice. It was because the letter wrote by the Appellant to the IRD of 24 September 2014 was not a notice of appeal. Neither was it a request for an extension of time to file a notice of appeal.

31. Company A was engaged by the Appellant. It had nothing to do with any third party. The mistake, if any, as to the party with which to file the notice of appeal was unilateral and made solely on the part of the Appellant. The Board agrees that the unilateral mistake on the part of the Appellant did not amount to a reasonable cause which prevented him from filing a notice of appeal within the statutory period.

32. Upon receipt of the Appellant's letter dated 24 September 2014, the Respondent by his letter of 30 September 2014 advising the Appellant of the proper procedure to lodge an appeal to the Board of Review and referring him to paragraph 3 of the

Respondent's letter of 2 September 2014 which summarized the time limit and procedure of lodging an appeal and the contact details of the Board of Review.

33. The Appellant said that he could only read this letter upon return from his trip on 6 October 2014. By then, it was not possible for him to file a notice of appeal within the statutory period. In this regard, the Board accepted the Respondent's submission that there was no obligation on the Respondent's part to draw the Appellant's attention to the time limit and procedures again because they were fully provided in his letter of 2 September 2014 to the Appellant. The letter of 30 September 2014 was sent as a courtesy or a service to the Appellant only.

34. Having considered all the evidences, the submissions provided by both sides and relevant legal principles, the Board could not come to any conclusion that there was any reasonable cause which prevented the Appellant from filing a notice of appeal within the statutory period.

Conclusion

35. In the circumstances, the only conclusion the Board can make is to dismiss the Appellant's application for leave to grant him an extension of time to file the notice of appeal against the Respondent's determination dated 2 September 2014. As there is no proper appeal before the Board, the Salaries Tax Assessment in question should stand.